

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DARCIE HANSEN,)
Plaintiff,) No. 07-247-HU
v.)
ADVO, INC.,) OPINION AND ORDER
Defendant.)

)

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HUBEL, Magistrate Judge:

Plaintiff Darcie Hansen brought this action against her former employer, Advo, Inc., asserting claims for sex discrimination, sexual harassment, and retaliation in violation of Title VII, 42

1 U.S.C. § 2000e and Or. Rev. Stat. § 659A.030, and a common law
 2 claim for intentional infliction of emotional distress.

3 Judgment was entered in this case for defendant Advo, Inc.
 4 after the court awarded Advo summary judgment on all claims. Advo
 5 now moves the court for an award of attorney's fees incurred after
 6 the close of discovery, in the amount of \$28,265, and costs in the
 7 amount of \$1,910, pursuant to Title VII, § 706(k), 42 U.S.C. §
 8 2000e-(k).

9 As the Supreme Court explained in Christiansburg Garment Co.
 10 v. EEOC, 434 U.S. 412, 421-22 (1978):

11 A district court may in its discretion award attorney's
 12 fees to a prevailing defendant in a Title VII case upon
 13 a finding that the plaintiff's action was frivolous,
 unreasonable, or without foundation, even though not
 brought in subjective bad faith.

14 In applying these criteria, it is important that a
 15 district court resist the understandable temptation to
 engage in *post hoc* reasoning by concluding that, because
 16 a plaintiff did not ultimately prevail, his action must
 have been unreasonable or without foundation. This kind
 17 of hindsight logic could discourage all but the most
 airtight claims, for seldom can a prospective plaintiff
 be sure of ultimate success.

18 434 U.S. at 421-22. This standard has been described as a
 19 "plaintiff-friendly dual standard." Lane v. Residential Funding
20 Corp., 323 F.3d 739, 742 (9th Cir. 2003). Because Congress intended
 21 to "promote the vigorous enforcement of the provisions of Title
 VII," the district court must be cautious in awarding fees to a
 23 prevailing defendant, in order to avoid discouraging legitimate
 suits that may not be "airtight." EEOC v. Bruno's Restaurant, 13
 25 F.3d 285, 287 (9th Cir. 1993), quoting Christiansburg Garment, 434
 26 U.S. at 422, 423 n. 20. Thus, even when the law or facts appear
 27

1 questionable or unfavorable at the outset, a party may have an
2 entirely reasonable ground for bringing suit. Bruno's Restaurant,
3 13 F.3d at 290; Christiansburg Garment, 434 U.S. at 422.

4 Or. Rev. Stat. § 359A.885(1) provides that, in specified
5 actions for unlawful employment practices, a "court may allow the
6 prevailing party costs and reasonable attorney fees at trial and on
7 appeal." However, under Oregon case law, a court has discretion to
8 allow attorney fees to a prevailing defendant under Or. Rev. Stat.
9 § 659A.885(1) only when the plaintiff's claim is brought in bad
10 faith or is unreasonable or unfounded. Chase v. Vernam, 199 Or.
11 App. 129, 134 (2005). In evaluating whether plaintiff's claim was
12 unreasonable or unfounded, the court considers the evidence in the
13 light most favorable to plaintiff. Id. at 135.

14 The terms "frivolous," "unreasonable," and "without
15 foundation," as used in the context of fee-shifting statutes, do
16 not have appreciably different meanings. Alaska Right to Life PAC
17 v. Feldman, 504 F.3d 840 (9th Cir. 2007). An action is frivolous
18 when the result appears obvious or the arguments are wholly without
19 merit. Christiansburg Garment, 434 U.S. at 422; see also Hughes v.
20 Rowe, 449 U.S. 5, 14-15 (1980 ((per curiam)). That a party loses at
21 summary judgment does not render her case *per se* frivolous,
22 unreasonable, or without foundation. Galen v. County of Los
23 Angeles, 477 F.3d 652, 667 (9th Cir. 2007).

24 Upon review of the entire record in this case, I am
25 unpersuaded that plaintiff's case was fivolous, unreasonable, or
26 without foundation. Accordingly, defendant's motion for an award of
27

1 attorney's fees (doc. # 37) is DENIED.

2 Advo requests costs in the amount of \$1,910 as follows:

3 \$ 240.00 for the filing fee

4 \$ 139.53 for copies "necessarily obtained for use in the case"

5 \$1,530.50 reporting fees for depositions of plaintiff, Tim

6 Townsend, Ken Niebur, Rich Cronkrite, and Roger Fune

7 These costs are allowed.

8 IT IS SO ORDERED.

9 Dated this 29th day of May, 2008.

10
11 /s/ Dennis James Hubel
12 Dennis James Hubel
United States Magistrate Judge